OPS SURIA (EM) SDN BHD

v.

AYUDA ENGINEERING SERVICES ENTERPRISE SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[CIVIL ACTION NO: 22-111-2010-III]
13 FEBRUARY 2012

CIVIL PROCEDURE: *Jurisdiction - High Court - Powers of High Court - Transfer of case - Defendant's application to transfer case from Kuching to Sandakan - Whether High Court could transfer case from one branch to another - Doctrine of forum non conveniens - Factors to consider in determining appropriate forum for trial - Whether proven by defendant - Whether case fell within Sandakan's jurisdiction - Courts of Judicature Act 1964, s. 23(1)*

CONSTITUTIONAL LAW: *Courts - High Court - Jurisdiction - Power to transfer cases - Whether court has power to transfer case to another branch - Courts of Judicature Act 1964, s. 25(2)*

The plaintiff and the defendant participated in a school electrification programme run by the Federal Government, who later awarded the defendant with some of its school electrification project. The plaintiff's case against the defendant was that the defendant breached the agreement it had signed by which the plaintiff would have the first option to become the subcontractor of the project. The said case was filed at the Kuching branch of the High Court of Sabah and Sarawak ('the KHC'). This present application was by the defendant to transfer the case to the Sandakan branch of the same court ('the SHC') based on the doctrine of *forum non conveniens*. The plaintiff objected to the transfer and argued that the court did not have the power to order the transfer for this case to another branch of the High Court. Citing the case of *Malacca Securities Sdn Bhd v. Loke Yu*, the plaintiff submitted that the power to transfer could only be exercised in the manner prescribed by the rules of court pursuant to para. 12 of the Schedule under s. 25(2) of the Courts of Judicature Act 1964 ('the CJA'). It was argued that since no rules to exercise it had been prescribed, the power to transfer could not be exercised by the court.

Held (allowing defendant's application with no order as to costs):

(1) The school electrification project awarded to the defendant required work to be carried out in the Sandakan area and was almost completed. The defendant's contention that their witnesses were in Sandakan had not been contradicted and as such, it would be vexed with unnecessary expenses in bringing its witnesses to Kuching. The plaintiff should have foreseen that any legal dispute between them and the defendant would be adjudicated in the SHC when it chose to do business in Sandakan. The only apparent connection of this case to Kuching was the plaintiff's residence. Besides that, the plaintiff had not furnished any compelling reason for this action to be tried in Kuching. Therefore pursuant to s. 23(1) of the Courts of Judicature Act 1964, the SHC was the more appropriate forum for this case. *(Malacca Securities Sdn Bhd v. Loke Yu)*. (para 7)

(2) Paragraph 12 of the Schedule is a simple, clear and straightforward provision and therefore if it was the Parliament's intention for the power in transferring case under para. 12 to be exercisable only if there are existing rules of court prescribing the manner of exercising such power, clear words would have been inserted in the proviso. In the circumstances, the power to transfer cases conferred by para. 12 of the Schedule could be exercised despite the absence of special rules to exercise it. *Rashidah Mohammad v. Mayban Finance Bhd*; and *Hj Sharkhan Abd Rahman v. Kaf-Seagroatt & Campbell Securities Sdn Bhd.* (paras 13 & 14)

Case(s) referred to:

Amanah Finance Malaysia Berhad v. Aura Vista Sdn Bhd & Ors [2000] 5 CLJ 229 HC ***(refd)***

American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 SC ***(refd)***

Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 FC ***(refd)***

Hj Sharkhan Abd Rahman v. Kaf-Seagroatt & Campbell Securities Sdn Bhd [2004] 6 CLJ 312 HC ***(foll)***

Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 HC ***(foll)***

Rashidah Mohammad v. Mayban Finance Bhd [2003] 2 CLJ 542 ***(foll)***

Riviera Bay Resort & Condo Management Sdn Bhd v. Sri Rimba Mentari Development Sdn Bhd [2003] 8 CLJ 720 HC ***(refd)***

Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1987] 1 LNS 55 HC ***(refd)***

Spiliada Maritime Corp v. Cansulax Ltd [1986] 3 All ER 84 ***(refd)***
The Abidin Daver [1984] AC 398 ***(refd)***
The Atlantic Star [1973] 2 All ER 175 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 20, 23(1), 25(2) para 12

For the plaintiff - Jonathan Chong; M/s TC Chong & Advocates
For the defendant - Lim Heng Choo (Colin Lai with him); M/s Lai & Co

Reported by Melanie Murthy

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is an application by the defendant *vide* summons in chambers to transfer this writ action which was filed here in the Kuching branch of the High Court of Sabah and Sarawak to the Sandakan branch of the same court. The application is objected to by the plaintiff.

Brief Facts

[2] The facts relating to the claim of the plaintiff are as follows. The plaintiff is a company that specializes in the installation, design, delivery and commissioning of equipment that produces solar electricity. The defendant is a government contractor. They had participated in the Federal Government's rural school electrification programme called "Merekabentuk, membina dan membekalkan, menyiap and menyelenggara sistem Solar Hibrid bagi Sekolah Luar Bandar". The defendant had been awarded packages 11 and 12 of the said project by the Federal Government. Briefly stated, the plaintiff's case is that the defendant signed an agreement whereby the plaintiff would have the first option to become the subcontractor of the project. The plaintiff pleaded that in breach of that agreement, the defendant had appointed a third party to do the works or are doing it themselves. The plaintiff has prayed for injunction, specific performance and damages. In brief, the defence is as follows:

(1) There was no consideration.

(2) That one of the signatories to the agreement lacked capacity as he was not a director.

(3) That one of the signatories was misled by a corrupt motive and that undue influence was exerted over him.

(4) That the project is almost complete with some schools reaching 95% stage of completion in respect of electrification works.

Application For Transfer To Sandakan High Court

[3] The defendant has now applied for the following orders:

(a) That the present proceedings be transferred from the High Court of Sabah and Sarawak at Kuching to the High Court of Sabah and Sarawak at Sandakan; and

(b) That the plaintiff do all such acts and things as may be necessary to facilitate the transfer of the present proceedings from the High Court of Sabah and Sarawak at Kuching to the High Court of Sabah and Sarawak at Sandakan; and

(c) That all matters in the present proceedings be stayed pending the transfer thereof from the High Court of Sabah and Sarawak at Kuching to the High Court of Sabah and Sarawak at Sandakan; and

(d) That the costs of and occasioned by the present application be given to the defendant, to be taxed unless otherwise agreed with the plaintiff; and

(e) That this Honourable Court grants such further or other relief which it deems fit.

[4] Counsel for defendant has not questioned the jurisdiction of this court under s. 23(1) of the Courts of Judicature Act 1964. Indeed, he could not have done so for the following reason. There are only two High Courts in Malaysia, ie, the High Court in Malaya and the High Court in Sabah and Sarawak. Each of these High Courts have jurisdiction over disputes that arise anywhere within its local jurisdiction. In the case of the High Court of Sabah and Sarawak, local jurisdiction has been defined in s. 3 to mean the territory comprised in the States of Sabah and Sarawak and the Federal Territory of Labuan (see *Fung Beng Tiat v. Marid*

Construction Co [1997] 2 CLJ 1). In the premises, even if the cause of action arose in Sandakan, the Kuching branch of the High Court of Sabah and Sarawak would have concurrent jurisdiction to entertain the proceedings (see *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1987] 1 LNS 55).

Forum Non Conveniens

[5] The defendant has applied to transfer this case to Sandakan on the principle of *forum non conveniens*. The doctrine of *forum non conveniens* means that there being some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice (see the House of Lords case of *Spiliada Maritime Corp v. Cansulax Ltd* [1986] 3 All ER 84 which was cited with approval by the Malaysia Supreme Court in *American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273). Lord Goff who delivered the leading judgment of the House of Lords in the above case said the word *'conveniens'* in *forum non conveniens* meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. His Lordship also cited with approval the statement of Lord Keith in *The Abidin Daver* [1984] AC 398 at p. 415, who said that the "natural forum" as being "that with which the action had the most real and substantial connection." In *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22, Augustine Paul J in considering the circumstances in which the Court may decline to exercise the jurisdiction it possesses on the ground of forum non conveniens cited with approval the case of *The Atlantic Star* [1973] 2 All ER 175 where Lord Morris of Borth-y-Gest said at pp 183-184:

> The cases show that if there is jurisdiction in the court and if a plaintiff becomes enabled to invoke it and chooses to do so he may nevertheless in some circumstances not be allowed to do so. In the decisions which indicate what those circumstances are certain words constantly emerge. They are such words as 'vexation' or 'oppression'. Thus in *McHenry v. Lewis* [1882] 22 Ch D 397, Sir George Jessel MR said that it was part of the general jurisdiction of the court to prevent a defendant being 'improperly vexed' by legal procedure ... .

[6] Augustine Paul J then proceeded to re-state the above principle in the local context as follows:

A For all practical purposes the branch High Courts can thus be considered as having their own jurisdiction. In my opinion it would therefore be oppressive and vexatious to commence proceedings in a branch of the High Court in Malaya when it could have been more suitably or appropriately commenced in another branch as it would defeat the very object for which the B branch High Courts were set up. This would amount to a defendant being improperly vexed by legal procedure if a plaintiff is to be allowed to choose a branch High Court of his choice by virtue of the local jurisdiction of the High Court in Malaya. As Scott LJ said in *The Atlantic Star* it is part of the general C jurisdiction of the court to prevent such abuse. The corollary is that an action should be filed and heard in the proper branch of the High Court in Malaya. Thus as illustrated by *Sova Sdn Bhd* a branch High Court can decline to exercise its jurisdiction even when the other forum is another branch court.

D **[7]** In determining which is the *forum conveniens*, Augustine Paul J said that s. 23(1) of the CJA, enacted to determine the territorial jurisdiction of the two High Courts in Malaysia, should serve as the basis. I shall gratefully adopt the same view as there is no better guideline to determine *forum conveniens*. In practice, this is E what happens every day in the registries of the branch courts of the Sabah and Sarawak High Court. For example, if the cause of action arises within Kuching District, the case would ordinarily be filed in the Kuching branch of the High Court of Sabah and Sarawak. This is for the convenience of the parties as well as for F the orderly distribution of the business between the various branches of the High Court. However, this is not a hard and fast rule, as in some cases, a majority of the witnesses may reside in the "jurisdiction" of a branch Court other than where the cause of action arose or where the defendant resides. It is also possible G that for some other reason, another branch court is the more appropriate or suitable forum. In the instant case, from my reading of the pleadings and the affidavits, the case falls within the "jurisdiction" of the Sandakan branch of the High Court of Sabah and Sarawak. My reasons are as follows. The school electrification H project that was awarded to the defendant requires work to be carried out in the Sandakan area. The plaintiff did not plead in the Statement of Claim that the agreement between the plaintiff and the defendant was signed in Kuching. The plaintiff referred to an agreement purportedly signed by two proposed co-defendants I in Kuala Lumpur. Even if this is true, there is still no connection to Kuching. Counsel for plaintiff resourcefully argued that if the

letter appointing the plaintiff as a sub-contractor was issued by the defendant, it would have been addressed to the plaintiff's Kuching office. Therefore, he submitted that the place of breach is Kuching. With respect, I do not see any real or substantial connection to Kuching. If the defendant had wrongfully refused to issue the letter appointing the plaintiff as a sub-contractor, the decision must have been made in Sandakan where its officers are based. Therefore, the breach had occurred in Sandakan. The plaintiff has claimed that the registered address of the defendant is now in Kuala Lumpur. However, the defendant has disputed that averment because the plaintiff has written letters to the defendant's Sandakan office. Be that as it may, the facts underlying the dispute have no connection to the Kuching area. As stated by Lord Keith in *The Abidin Daver (supra)*, the "natural forum" is the place where "the action had the most real and substantial connection". In the instant case, that place is Sandakan. The only apparent connection of the instant case to Kuching is that the plaintiff is based there. However, the residence of the plaintiff is not one of the factors that can found jurisdiction under s. 23(1) of the Courts of Judicature Act 1964. Furthermore, in the instant case, the plaintiff has not undertaken any works as yet and, therefore, the question of their technical personnel such as architects and engineers travelling to Sandakan from Kuching cannot arise. On the other hand, the project undertaken by the defendant is almost completed. The contention of the defendant that their witnesses are in Sandakan has not been contradicted. Therefore, the defendant would be unnecessarily vexed and put to considerable expense by being required to bring witnesses to Kuching. As the plaintiff chose to do business in Sandakan, they should have foreseen that any legal dispute between them and the defendant would be adjudicated by the Sandakan High Court. Lastly, I also note that counsel for plaintiff has not furnished any compelling reason why this action would more appropriately and suitably be tried in Kuching, even if the natural forum is the Sandakan High Court. I am, therefore, of the opinion that the Sandakan High Court is the more appropriate forum for this action.

[8] Before I conclude this part of the judgment, I must address the point of delay. Counsel for plaintiff submitted that the defendant did not take up the *forum non conveniens* issue at the

earlier stage when the interlocutory applications were heard. I see no merit in this point. In the instant case, the writ was issued just over a year ago. The parties have yet to complete the discovery process. In the premises, as the defendant has succeeded in proving that the Sandakan High Court is the more accessible and natural forum for this case, I am minded to allow this application. However, counsel for plaintiff has argued that I do not have the power to order the transfer of this case to another branch of the High Court. I shall address the point below.

Power Of High Court To Transfer

[9] Counsel for plaintiff argued that the High Court has no power to transfer a case. His reasons are as follows. Paragraph 12 of the Schedule to the Courts of Judicature Act 1964 which confers the High Court additional powers under s. 25(2) reads as follows:

> **12. Transfer of proceedings**
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> Power to transfer any proceedings to any other Court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.

[10] Counsel for plaintiff submitted that the power to transfer can only be exercised in the manner prescribed by rules of court. Since, no rules to exercise this power has been prescribed, the power cannot be exercised. In support, he cited the judgment of Augustine Paul J in *Malacca Securities Sdn Bhd v. Loke Yu (supra)*. His Lordship opined that in the absence of any rules having been made as required by the proviso to para 12, the power conferred by that paragraph cannot be exercised. His Lordship then suggested that the applicant who succeeds on the issue of *forum non conveniens* is not without remedy because he can apply to the Chief Judge under s. 20 of the Courts of Judicature Act 1964 which provides as follows:

> **20. Distribution of business**
>
> The distribution of business among the Judges of the High Court shall be made in accordance with such directions, which may be of a general or a particular nature, as may be given by the Chief Judge.

[11] This decision was followed in *Amanah Finance Malaysia Berhad v. Aura Vista Sdn Bhd & Ors* [2000] 5 CLJ 229. Abdul Wahab Patail J in that case agreed with the reasoning of Augustine Paul J and held that a branch of the High Court cannot exercise the power under para 12 to transfer any case to another branch of the High Court unless the requisite rules have been made. However, the reasoning of Augustine Paul J in *Malacca Securities Sdn Bhd v. Loke Yu (supra)* on this point was not followed in two other cases, namely, *Rashidah Mohammad v. Mayban Finance Bhd* [2003] 2 CLJ 542 and *Hj Sharkhan Abd Rahman v. Kaf-Seagroatt & Campbell Securities Sdn Bhd* [2004] 6 CLJ 312.

[12] In *Riviera Bay Resort & Condo Management Sdn Bhd v. Sri Rimba Mentari Development Sdn Bhd* ([2003] 8 CLJ 720), Low Hop Bing J (as he then was) did not expressly discuss whether special rules are necessary for a transfer of case from one High Court branch to another. The case concerned transfer of cases between the High Court and the Lower Court. However, the suggestion in *Malacca Securities Sdn Bhd v. Loke Yu (supra)* and *Amanah Finance Malaysia Berhad v. Aura Vista Sdn Bhd & Ors (supra)* that s. 20 should be invoked to transfer a case on the ground of *forum non conveniens* did not commend itself to Low Hop Bing J. His Lordship said as follows:

> In these two judgments, the respective learned judges alluded to the alternative remedy of the defendants to make an application to the learned Chief Judge under s. 20 of the CJA 1964 regulating the distribution of business among the judges of the High Court in accordance with such directions as may be given by the learned Chief Judge. As the applicant before me has indeed applied to the learned Chief Judge for an order of transfer, and has been directed to apply to this High Court, the learned Chief Judge must have contemplated that this court has the jurisdiction which is unlimited: *Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors* [1997] 2 CLJ 58, as referred to in *Malacca Securities, supra.*

[13] In *Rashidah Mohammad v. Mayban Finance Bhd (supra)* which was in respect of transfer of cases between different branches of the High Court, Mohd Hishamudin J (as he then was) clearly departed from the view of Augustine J that rules of court should provide for the exercise of the power conferred by para 12 of the Schedule to the Courts of Judicature Act 1964. His Lordship said as follows:

A However, with respect, I take a different view. In my judgment, by virtue of para. 12 of the Schedule, I have the power to grant the application to transfer the proceeding from this court to the High Court of Kuala Terengganu, regardless of the fact that, other than the Rules of the High Court 1980, there are, presently, no rules of court regulating the exercise of such power. I have B carefully examined para. 12, however, I fail to see in what way the absence of such rules of court precludes this court from exercising the power granted by this paragraph. To my mind, para. 12 is a simple, clear and straightforward provision: a High Court is empowered to transfer a proceeding to any other High C Court, and the exercise of such power to transfer the proceeding is only subject to the rules of court, if there are any such rules. What the proviso means is merely that if there are rules of court in existence regulating the exercise of the power conferred by para. 12, then, the exercise of the power must be in accordance with such rules. The proviso does not say, nor can it be implied, D that if there are no such rules then the power cannot be exercised. Thus I do not find anything in the proviso that warrants an interpretation that if no rules of court are in existence then the court cannot exercise the power. I should add that if at all it is the intention of Parliament that the power to transfer E under para. 12 cannot be exercised unless and until there exists rules of court prescribing the manner of exercising such power, then, surely, clear words to that effect would have been inserted in the proviso. It is an illegitimate practice to read words into a statute that are not there, except, perhaps, in cases of manifest absurdity. Further, it is also significant to note that the proviso F does not make it mandatory for the Rules Committee to make such rules; for the proviso merely states "... as may be prescribed ..." The word "may" is used by the proviso and not the word "shall". This fact also weakens any argument to the effect that there must be in existence special rules of court before G the power could be exercised.

[14] With respect, I shall gratefully adopt the view taken by Mohd Hishamudin J that the power conferred by para 12 of the Schedule can be exercised although there are no special rules in H existence for the exercise of it. In *Hj Sharkhan Abd Rahman v. Kaf-Seagroatt & Campbell Securities Sdn Bhd (supra)* as well, Sulaiman Daud J (as he then was) refused to follow the reasoning of Augustine Paul J in *Malacca Securities Sdn Bhd v. Loke Yu (supra)*. His Lordship said as follows:

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Bagi menyokong hujahnya peguam terpelajar itu merujuk kepada kes *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22 di mana telah diputuskan bahawa kuasa di bawah para 12 Jadual kepada Akta tersebut tidak boleh dijalankan tanpa wujudnya kaedah-kaedah yang dinyatakan dalam proviso kepada para tersebut. Saya menghormati keputusan kes tersebut tetapi bagaimanapun saya mempunyai pendapat yang berbeza. Pada pendapat saya proviso tersebut hanya memperkatakan bahawa kuasa-kuasa sedemikian hendaklah dijalankan mengikut prosedur yang boleh atau mungkin ditetapkan melalui kaedah mahkamah. Ini tidak bermakna penetapan kaedah sedemikian adalah suatu syarat duluan bagi perlaksanaannya. Saya dapati bahawa permohonan ini yang dibuat sebagai suatu permohonan interlokutori melalui saman dalam kamar di bawah peruntukan KKMT 1980 adalah suatu pematuhan kepada kaedah mahkamah sebagaimana yang ditetapkan dalam proviso tersebut.

Kuasa pemindahan sedemikian juga telah disentuh oleh Mahkamah Rayuan dalam kes *Lian Mong Yee v. Abdul Rashid Maidin & Ors* [2001] 3 CLJ 905. Dalam kes tersebut satu daripada isu di hadapan mahkamah tersebut ialah sama ada hakim boleh membuat perintah supaya suatu prosiding di mahkamah lain dipindahkan ke mahkamahnya. Dalam menyampaikan keputusan mahkamah rayuan itu Gopal Sri Ram HMR memberi pandangan bahawa perenggan 12 Akta Mahkamah Kehakiman 1964 memberi kuasa kepada Mahkamah Tinggi untuk memindahkan sesuatu guaman yang ada di hadapannya kepada mahkamah lain tetapi tidak sebaliknya.

[15] As I agree with the views expressed in *Rashidah Mohammad v. Mayban Finance Bhd (supra)* and *Hj Sharkhan Abd Rahman v. Kaf-Seagroatt & Campbell Securities Sdn Bhd (supra)* on the power of the court to transfer a case under para 12 of the Schedule of the Court of Judicature Act 1964, I reject the submission of counsel for plaintiff that a case can only be transferred if section 20 is invoked by way of application to the Chief Judge.

[16] I shall grant order in terms of para (a) and (c) of the summons in chambers dated 7 December 2011. However, I shall not make any order of costs as the defendant should have made this application at the earliest opportunity so that there is no delay in scheduling this case for trial before the proper court. The file will be dispatched to the Sandakan High Court as soon as the fair copy of the order is sealed by the defendant solicitors.